SUPREME COURT, U.S.
FILED
MAR 31 1980
MICHAEL RODAK, JR., CLERK

In The

# Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1335

ROBERT ABRAMS, as Attorney General of the State of New York,

*Petitioner,*

*against*

DAVID S. SALLA, ROBERT W. KEPPLEY, and LISBON CONTRACTORS, INC.,

*Respondents,*

*and*

COUNTY OF MONROE, etc.,

*Respondents*

**On Petition For A Writ of Certiorari To The Court of Appeals of The State of New York**

## RESPONDENT COUNTY OF MONROE'S BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The Daily Record
Rochester, New York

(5878)

Spaulding Law Printing
Syracuse, New York

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The respondents, County of Monroe of the State of New York and the Division of Pure Waters of the County of Monroe, respectfully request that this Court grant the petition for writ of certiorari, seeking review of the decision of the Court of Appeals of the State of New York.

## REASONS FOR GRANTING THE WRIT

1. The decisions below directly conflict with this Court's Privileges and Immunities rulings in *Hicklin v. Orbeck*, and *Doe v. Bolton*.

In *Hicklin v. Orbeck*, 437 U.S. 518 (1978), this Court continued to recognize the limited right of a State to limit nonresident access to State-owned or created resources as such right was set forth in decisions such as *McCready v. Commonwealth of Virginia*, 94 U.S. 391 (1876) and *Doe v. Bolton*, 410 U.S. 179 (1973). (See also Tribe, American Constitutional Law, Section 6.33 Supp. (1979), pp. 38-39). Indeed, in *Hicklin, supra*, this Court stated that generally, State ownership of the particular resource in question will be dispositive of the issue. *Hicklin* at 530.

It is true this Court did strike down the Alaska statute at issue in *Hicklin, supra*. However, this Court indicated that the reason the Alaska statute requiring only Alaskan residents to be hired on the Alaska pipeline project was held in violation of the Privileges and Immunities Clause was that the Alaska statute exceeded the bounds of the public ownership doctrine by potentially applying to employers who had no connection with Alaska at all. As this Court stated:

> Under this provision, Alaska Hire extends to employers who have no connection whatsoever with the State's oil and gas, perform no work on State land, have no contractual relationship with the State. The Act goes so far as to reach suppliers who provide goods or services to subcontractors, who, in turn, perform work for contractors despite the fact that none of these employers may have direct dealings with the State's oil and gas and never set foot on State land. at 437 U.S. 530.

In the case at bar, the New York Court of Appeals declared that Section 222 of the New York State Labor Law violated the Privileges and Immunities Clause and, therefore, declared Section 222 unconstitutional. Section 222 requires that a



preference be given to New York State residents on public works projects. In light of the aforesaid holdings of this Court regarding the public ownership doctrine, the Court of Appeals' holding was erroneous.

Section 222 clearly falls within the public ownership doctrine. The State resource in which New York State is preferring its own residents is in the expanded employment opportunities that are created whenever the State embarks upon a public works project. Moreover, unlike the statute in *Hicklin, supra*, Section 222 does not overstep the public ownership exception. Section 222's restrictions apply only to construction activity taking place on State lands. Also, unlike the *Hicklin, supra*, statute, Section 222 does not attempt to regulate private employers. The restrictions of Section 222 have absolutely no applicability to the private construction industry in New York.

Finally, contrary to the assertions of the Court of Appeals, the presence of federal funding for the construction project at issue herein has no relevance to the Privileges and Immunities analysis herein. The record in this case does not indicate that Congress, in enacting the legislation that gave rise to the sewer construction project at issue, placed any restrictions on New York's ability to limit employment to New York State residents. (See *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978) at page 390, fn 23.)

In conclusion, as Justice Gabrielli of the New York Court of Appeals stated in his dissenting opinion:

> While it is true that a state may not boldly exploit its passive ownership of a resource by indirectly using it as a basis for requiring discrimination against nonresidents in private hiring, nothing in *Hicklin* or the cases preceding it suggests that when a state has created a resource such as job opportunities, it cannot direct that the resources be used to the advantage of its own citizens.

2. The decisions below directly conflict with this Court's Commerce Clause holding in *Hughes v. Alexandria Scrap.*

This Court has specifically held that where a state, through the exercise of its spending power, creates a market that would not otherwise have existed, that the Commerce Clause is not violated if the state seeks to limit access to the state-subsidized market to state residents only. *Hughes v. Alexandria Scrap, Corp.*, 426 U.S. 794 (1976) at pp 806-810. (See also, *City of Philadelphia v. New Jersey*, 98 S.Ct. 2531 (1978), at fn. 6.)

In the case at bar, the lower New York Courts erroneously held that Section 222 violates the Commerce Clause. The construction project at issue herein is a totally State created market which would not have existed but for the State deciding to exercise its spending powers and commence this construction project. Since Section 222's restrictions are applicable only to the State created jobs on public construction projects, Section 222 does not run afoul of the Commerce Clause.

3. The decisions below directly conflict with this Court's Equal Protection holdings in *Shapiro v. Thompson* and *Memorial Hospital v. Maricopa County.*

In *Shapiro v. Thompson*, 394 U.S. 618 (1969) this Court held that the right to travel is a fundamental right and consequently any State statute seeking to limit the right to travel must be able to withstand the compelling state interest test. In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), however, this Court held that only travel into a State with the intent to remain therein is accorded fundamental right status.

In the case at bar, the lower New York Courts erroneously held that Section 222 violated respondents' Salla's and Keppley's right to travel. However, the record herein clearly indicated that Salla and Keppley came to New York to work on the construction project at issue herein without any intent to remain or settle in New York. Hence, it was an error for the lower Courts



to hold that Keppley's and Salla's fundamental right to travel was violated.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Rochester, New York
March 26, 1980

Respectfully submitted,

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